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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JON PETER MONTONEN, Defendant and Appellant.	A125257 (Del Norte County Super. Ct. No. CR-F-08-9605)

Jon Peter Montonen appeals from a judgment upon a jury verdict finding him guilty of transportation of methamphetamine (Health & Saf. Code, § 11379) and possession of methamphetamine (*id.*, § 11377, subd. (a)). The jury acquitted defendant of possession of a hypodermic needle and was unable to reach a verdict on a count alleging possession of methamphetamine for sale. In a bifurcated proceeding, defendant admitted that he suffered two prior prison terms (Pen. Code, § 667.5, subd. (b)). He contends: (1) the evidence is insufficient to support the verdict on the transportation count, (2) the court erred in instructing the jury pursuant to CALCRIM No. 2300, and (3) the court's admission of his extrajudicial statement violated his *Miranda*[1] rights. In a supplemental brief, defendant contends that he is entitled to additional presentence credits under recent amendments to Penal Code section 4019. We remand the matter for a recalculation of defendant's presentence credits and otherwise affirm.

[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

I. FACTS

On October 25, 2008, Officer James Gay observed Steve Wiktorin driving a car on Highway 101 and effected a traffic stop. Gay knew that Wiktorin did not have a driver's license, and dispatch confirmed Wiktorin's status prior to Gay's executing the stop. Defendant was in the passenger seat of the car. Gay detained Wiktorin and placed him in the police car. Wiktorin gave Gay permission to search his car. For officer safety, Gay asked defendant to exit the car. He then asked defendant whether he had any weapons. Defendant responded that he had a knife. Gay removed the knife from defendant's pants pocket and asked him to sit on the curb.

Gay then turned to search the car and saw a hypodermic syringe wrapped in a latex glove in plain view tucked in the sunroof above the front passenger seat. At this point, Gay arrested defendant and conducted a patdown search. Gay felt a hard square-type case in defendant's front pants pocket. For officer safety, he asked defendant what it was. Defendant replied, " 'Dope. What do you think?' " Gay retrieved a box from defendant's pocket. A scale was immediately behind the box in the pocket so when Gay retrieved the box, he pulled out the scale as well. Inside the box, Gay found three baggies of a crystal-like substance and about 15 small Ziploc style baggies.

Gay continued with the search of the car and found a black bag behind the driver's seat. It contained seven hypodermic syringes, a clear Ziploc bag containing another white crystal-like substance, a second Ziploc bag containing marijuana weighing 12.4 grams, and a blue metal tin containing marijuana. The bag also contained a funnel, an item that is used in transporting narcotics to prevent loss of the product. Gay located a second bag with a rainbow paisley pattern behind the driver's seat that contained $2,900 in cash in $100 bills, two cash-out slips from a casino, a Ziploc bag containing a white crystal-like substance, a torch commonly used in the consumption of methamphetamine, a spoon, an opened bottle of rum, two hypodermic needles, and an orange plastic tube containing a small amount of marijuana. In the glove box of the car, Gay found a spoon with a white crystal-like substance in the concave portion of the spoon. Based on his training, Gay testified that the shape of the spoon and the location of the white substance

were consistent with the use of methamphetamine. In the driver's side door, Gay found a small Ziploc bag containing a white crystal-like substance. Defendant was the car's registered owner.

Matthew Kirsten, a criminalist, testified that he analyzed the substances found in the three baggies removed from the box in defendant's pocket. Two of the baggies contained a powder containing methamphetamine: 26.82 grams in one and 26.94 grams in the other. Kirsten did not test the purity of the substances; he could not say specifically how much methamphetamine was in the powder, but his "feeling" was that "it's not a trifling amount." The third bag contained dimethyl sulfone, a substance commonly used as a narcotic cutting agent. Kirsten opined that obtaining fingerprints from plastic surfaces such as baggies was not very successful.

Seth Cimino, a narcotics investigator, testified as an expert in narcotics possession and sales. Cimino opined that the amount of drugs found in defendant's pants pocket was "just shy of two ounces," a large amount of methamphetamine, which having been found together with the scale, baggies, and cutting agent, suggested it was possessed for sale. He testified that two ounces of methamphetamine had a street value of $3,000 "on the low end."

In defense, Wiktorin testified that he was at a casino in town when he saw defendant arguing with Ryley Morgan, who defendant claimed owed him money. Morgan refused to pay defendant until she got her stuff out of his house. Wiktorin drove defendant to his house, and they waited outside while Morgan packed her bags. Wiktorin placed Morgan's bags in the car and testified that there was nothing other than her things there. Prior to leaving, defendant went to the car and took out the laptop bag to give it back to Morgan. Before giving it back, something came out of the bag and was put in defendant's pocket. Wiktorin was driving defendant back to the casino when he was stopped by the police.

Wiktorin admitted that he pled guilty to owning the hypodermic needle found in the passenger side of the car, and that he was convicted of felony possession of

methamphetamine in 2009. He testified that he had never seen defendant use or sell drugs.

Defendant testified that he lived with Morgan, his girlfriend. They had an argument at the casino on October 25 and he asked her to pay back $1,000 she owed him for the bail he had posted on her behalf. She agreed to give him the money if she could get all of her stuff from his house. Wiktorin put all of her bags in the car. None of the things in the car belonged to him. Morgan was supposed to leave with Wiktorin to pick up a car at the casino but at the last minute, she told defendant that she was high on drugs. Defendant felt sorry for her so he told her to stay home and that he would get the car. Morgan wanted her laptop from the car so he retrieved the laptop bag from the car and he took her black "wallet"[2] out of the bag because he thought her money was in it.

Defendant admitted that he was convicted of second degree burglary in 1994, receiving stolen property in 1996, and auto theft in 2004. He denied that he had suffered any felony drug charges or convictions. He testified that he did not know drugs were in his pocket and that the "stuff" in his pocket did not belong to him. He claimed that he did not recall telling Gay that " 'dope' " was in his pocket. On cross-examination, he said that he did not recall being convicted of misdemeanor possession of a controlled substance in 1997.

Morgan testified that she won $4,000 at the Lucky 7 Casino in the early morning of October 25 and was paid in cash. She testified that the money she won was seized from defendant's car when he was arrested. She said she usually used a black sunglasses case as a wallet and that it was stored in her laptop bag. She had never seen defendant use methamphetamine. Morgan admitted that she had been convicted of being a felon in possession of a weapon, unlawful possession of methamphetamine, felony aggravated first degree theft, felony unauthorized use of a motor vehicle, two separate felonies of identity theft, and felony computer crime.

[2] It appears that the wallet was in fact a case for sunglasses.

John Fay, a licensed private investigator, testified that he worked several years in narcotics investigation for the Del Norte County Sheriff's Department and on many occasions he had used fingerprints to narrow down the main suspect in a case. He said that it would have been very easy to obtain fingerprints from baggies and the scale seized from defendant as well as other items found in the search.

II. DISCUSSION

A. Substantial Evidence Supports the Conviction for Transportation of Methamphetamine

Defendant contends that there is insufficient evidence to support his conviction for transportation of methamphetamine. He argues that there was no evidence adduced concerning the purity of the methamphetamine seized from his pocket; that there was no evidence the baggies contained a usable amount of methamphetamine; and accordingly, that there was insufficient evidence to support a finding he knew the powder was methamphetamine.

In determining whether the evidence is sufficient to support the verdict, we must review " 'the whole record in the light most favorable to the judgment' and decide 'whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Defendant's argument that there was no evidence he knew he was carrying methamphetamine, or evidence of its purity or usability ignores the record. Here, defendant acknowledged that he was carrying " '[d]ope.' " In addition, the evidence that the dope was methamphetamine was substantial. Not only did the evidence show defendant was carrying almost two ounces of methamphetamine, having a street value of at least $3,000, it was found in his pocket together with baggies, a cutting agent, and a scale suggesting the methamphetamine was possessed for sale. These circumstances demonstrated that defendant knew the narcotic nature of the substances found in his pocket. (See *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746 [transportation of controlled substance established by carrying a usable quantity of substance with

knowledge of its presence and illegal character]; cf. *People v. Tripp* (2007) 151 Cal.App.4th 951, 958-959 [small amount of methamphetamine powder found on nightstand did not suggest knowledge where it was not hidden or packaged in a characteristic manner or located with paraphernalia or carried on defendant's person].)

Defendant contends that there was no evidence of the purity of the methamphetamine he carried. The People, however, were not required to prove the purity of the methamphetamine seized. "The chemical analysis of the material possessed need only establish the existence of a controlled substance. A quantitative analysis establishing the purity of the controlled substance is not required." (*People v. Rubacalba* (1993) 6 Cal.4th 62, 65.) Contrary to defendant's argument, this is not a case where there was only a trace amount of a controlled substance found so there was no issue of whether the substance contained a usable amount. Rather, the evidence here demonstrated that the amount of the substance containing methamphetamine found on defendant was "too large of an amount to have for personal use," and would be enough for a two-month supply of narcotics assuming an individual used approximately a gram per day. There was also testimony that in its diluted form, a dealer will make more money and the user would still feel the effects of the stimulant. Consequently, substantial evidence supports the finding that defendant possessed not only a usable amount, but a significant quantity of a substance containing methamphetamine.

Defendant also contends that the evidence is insufficient to support the verdict because there was no evidence that he was transporting the methamphetamine "from one person to another as part of a distribution chain." He argues that the fact he was found with the methamphetamine in a moving car is not enough to support a conviction for transporting a controlled substance, and that evidence he was taking the drugs "somewhere as part of a trafficking scheme" is required.

Defendant is mistaken. *People v. Rogers* (1971) 5 Cal.3d 129 (*Rogers*)[3] and *People v. Ormiston* (2003) 105 Cal.App.4th 676 (*Ormiston*) are dispositive.

Defendant was convicted under Health and Safety Code section 11379, which criminalizes transportation of a controlled substance. " ' "Transport," as used in this statute, has no technical definition,' but rather 'as used in the statute is "commonly understood and of a plain, nontechnical meaning." [Citation.]' [Citation.] 'Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character.' [Citations.] 'The crux of the crime of transporting is movement of the contraband from one place to another.' [Citations.]" (*Ormiston, supra*, 105 Cal.App.4th at p. 682.)

Further, as our Supreme Court explained in *Rogers*, "the Legislature was entitled to assume that the potential for harm to others is generally greater when narcotics are being transported from place to place, rather than merely held at one location. The Legislature may have concluded that the potential for increased traffic in narcotics justified more severe penalties for transportation than for mere possession or possession for sale, without regard to the particular purpose for which the transportation was provided, a matter often difficult or impossible to prove." (*Rogers, supra*, 5 Cal.3d at p. 136, fns. omitted.)

Hence, the evidence here that defendant was found in possession of methamphetamine while he was a passenger in a moving car was sufficient to support his conviction of transporting methamphetamine. "Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt without further proof of an actual purpose to transport the drug for sale or distribution." (*Rogers, supra*, 5 Cal.3d at pp. 135-136.)

[3] Defendant's reliance on the concurring and dissenting opinion of Justice Mosk in *Rogers, supra*, 5 Cal.3d at page 139, is misplaced. We are bound by *Rogers*. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

B. The Court Did Not Err in Giving CALCRIM No. 2300

Defendant contends the trial court erred in giving CALCRIM No. 2300 because it did not explain to the jury that it was required to find the drugs were taken from one location to another for a prohibited purpose. The Attorney General argues that defendant forfeited the claim. We review the issue pursuant to Penal Code section 1259, which permits review of instructions given although no objection was made below "if the substantial rights of the defendant were affected thereby." (See *People v. Carey* (2007) 41 Cal.4th 109, 132.)

The court instructed the jury in the language of CALCRIM No. 2300 that to prove defendant was guilty of transporting methamphetamine, the People had to prove: "[O]ne, the defendant transported a controlled substance. Two, the defendant knew of its presence. Three, the defendant knew of the substance's nature or character as a controlled substance. Four, the controlled substance was methamphetamine. And five, the controlled substance was in a usable amount. [¶] A person transports something if he or she carries or moves it from one location to another, even if the distance is short. . . ."[4] Defendant faults the instruction's definition of the element of transporting.

The court correctly instructed the jury on the definition of transporting. The People were not required to prove the particular purpose of the transportation. As both the *Rogers* and *Ormiston* courts recognized, the Legislature was entitled to impose more severe penalties for transportation of controlled substances over mere possession without regard to the purpose of the transportation, which the courts acknowledged was a matter often difficult to prove. (*Rogers*, *supra*, 5 Cal.3d at pp. 136-137, *Ormiston*, *supra*, 105 Cal.App.4th at p. 683.)

[4] The court proceeded to instruct the jury on the remaining pertinent terms of the instruction, e.g., the definition of "usable amount" and the knowledge requirement, both of which defendant does not contend were given in error. (CALCRIM No. 2300.)

C. The Court Properly Admitted Defendant's Statement to Gay

1. Background

Upon his arrest, Gay conducted a patdown search of defendant and asked him what he had in his pocket, to which defendant, replied, " 'Dope. What do you think?' " In a hearing outside the jury's presence, Gay testified that during the patdown search he felt an object that was an unidentifiable hard object, so for his own safety he asked defendant what it was. Gay said that it "[c]ould have been a Taser." The trial court admitted the statement over defendant's *Miranda* objection. It found that the search was within the ambit of *New York v. Quarles* (1984) 467 U.S. 649 (*Quarles*), that it was conducted for Gay's safety, and that it was a reasonable precaution for Gay to ask defendant about the object before reaching into his pocket.

2. Analysis

In *Quarles*, the United States Supreme Court set forth the public safety exception to the requirements of *Miranda*. In *Quarles*, a woman reported to the police that she had been raped, the assailant had a gun, and that he fled into a supermarket. The police found the defendant inside the supermarket and detained him. In searching the defendant, the police found an empty shoulder holster and asked him where the gun was. The defendant told them it was hidden in a nearby carton. (*Quarles, supra*, 467 U.S. at pp. 651-652.) The court held that the defendant's statement was not excludable under *Miranda*. (*Quarles*, at pp. 655-656.) "[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers . . . in the untenable position of having to consider, often in a manner of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." (*Id.* at pp. 657-658.)

In *People v. Cressy* (1996) 47 Cal.App.4th 981, 986-989 (*Cressy*), the court followed *Quarle*s on facts similar to those here. There, in a traffic stop, the officer upon approaching the defendant's car, saw him with his hands extended out of the driver's window going through a wallet, and observed a syringe fall from either the wallet or the defendant's hands. The officer arrested the defendant for possession of the syringe and, before searching him, asked if he had any other needles or paraphernalia on his person. He responded negatively, but when the officer patted the defendant's pants pocket, the defendant said, " ' "I got a quarter in my right front pocket." ' " (*Cressy*, at p. 985.) The officer understood the defendant to mean a quarter gram of a controlled substance such as methamphetamine. The officer explained that he had asked the defendant about needles for his own safety because he had just arrested the defendant for a syringe and he did not want to get stuck with another one that might be on his person. (*Ibid.*) The court applied the public safety exception to the *Miranda* rule, noting that "[a]llowing a simple and narrow inquiry merely ensures that an officer need not put his safety at risk while engaging in otherwise lawful conduct." (*Cressy*, at pp. 988-989.)

Here, too, the trial court properly admitted defendant's statement to Gay under the public safety exception to *Miranda*. Gay testified that he did not know what the hard object was in defendant's pocket, but that for his own safety he asked defendant what it was. The evidence shows that prior to the patdown search, Gay had seized a hypodermic syringe from the passenger side of the car. And, prior to inquiring about what was in defendant's pants pocket, Gay removed a knife from another of his pants pockets. Given these circumstances, Gay was justified in being apprehensive for his safety and in asking defendant about the hard, unidentifiable object in his pants pocket. Gay's inquiry was narrowly focused; we discern no *Miranda* violation. (See *Cressy, supra*, 47 Cal.App.4th at p. 989 [inquiry must be narrowly tailored to prevent potential harm].)

D. Defendant Is Entitled to Additional Presentence Credits

Penal Code section 4019 was amended effective January 25, 2010, "so that, except for crimes not involved here, 'a term of four days will be deemed to have been served for every two days spent in actual custody.' (See Pen. Code, § 4019, subds. (b) & (c), as

amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50; Sen. Bill No. 3X 18 (2009-2010 3d Ex. Sess.) § 50 (Senate Bill No. 18).)" (*People v. Bacon* (2010) 186 Cal.App.4th 333, 335-336, petn. for review pending, petn. filed Aug. 3, 2010, time for grant or denial of review extended to Nov. 1, 2010, S184782.) The legislation addressed the state's fiscal crisis by, among other things, awarding presentence conduct credits at a greater rate, thereby reducing jail populations. (See, e.g., Stats. 2009, 3d. Ex. Sess. 2009-2010, ch. 28, §§ 41, 50.) There is a split of authority on whether the amendments to section 4019 are retroactive. (*Bacon, supra*, 186 Cal.App.4th at p. 336.) The issue is currently pending before our Supreme Court in numerous cases. (See, e.g., *People v. Pelayo* (2010) 184 Cal.App.4th 481, review granted July 21, 2010, S183552 (*Pelayo*) [amendments apply retroactively]; *People v. Norton* (2010) 184 Cal.App.4th 408, review granted Aug. 11, 2010, S183260 (*Norton*) [same]; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808 (*Landon*) [same]; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813 [same]; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963 [same]; *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724 [amendments apply prospectively]; *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314 [same]; and *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808 [same].)

We are persuaded on balance by the arguments favoring retroactive application of the amendments, a conclusion consistent with the reported cases from the First Appellate District (*Pelayo, supra*, 184 Cal.App.4th 481; *Norton, supra*, 184 Cal.App.4th 408; *Landon, supra*, 183 Cal.App.4th 1096) and with the legislation's stated aim of "address[ing] the fiscal emergency declared by the Governor" (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 62). Accordingly, we remand the matter for a recalculation of defendant's presentence credits.

III. DISPOSITION

The matter is remanded to the trial court with directions to recalculate defendant's credits under amended Penal code section 4019. The trial court shall prepare an amended

abstract of judgment and forward a copy to California's Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RIVERA, J.

We concur:

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RUVOLO, P.J.

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SEPULVEDA, J.